CRIMINAL YEAR SEMINAR

April 19, 2019 - Tucson, Arizona
April 26, 2019 - Phoenix, Arizona
May 3, 2019 - Chandler, Arizona

CONSTITUTIONAL LAW / TRAFFIC / DUI

Presented By:

The Honorable Dave Cole
Retired Judge of the Maricopa County Superior Court,
Deputy Solicitor General, Arizona Attorney General's Office
&
The Honorable Crane McClennen
Retired Judge of the Maricopa County Superior Court

Distributed By:
ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 W. Camelback Road, Suite 202
Phoenix, Arizona 85015

And

CLE WEST
5130 N. Central Ave
Phoenix, AZ 85012

Constitutional Law/Traffic/DUI

The Honorable Dave Cole

Retired Judge of the Maricopa County Superior Court, Deputy Solicitor General, Arizona Attorney General's Office

The Honorable Crane McClennen

Retired Judge of the Maricopa County Superior Court

1

U.S. Const. amend. 4 Search and seizure—Legitimate expectation of privacy.

- *State v. Hernandez,* 244 Ariz. 1, 417 P.3d 207 (2018). Officers determined vehicle's insurance had expired, followed vehicle, and turned on emergency lights; shortly thereafter, driver (defendant) turned into private driveway of residence that belonged to his girlfriend and proceeded into backyard area; defendant claimed he spent nights there frequently.
- **us.a4.ss.xp.050** An overnight guest has a legitimate expectation of privacy in the host's home.
- ¶¶ 11–12. Court held defendant, as overnight guest, had a reasonable expectation of privacy in its residence and curtilage.

2

U.S. Const. amend. 4 Search and seizure—Arrest within the home without a warrant.

- **us.a4.ss.aih.010** An officer may not arrest a person in a home without a warrant unless there is (1) consent or (2) exigent circumstances, which include (a) response to an emergency, (b) hot pursuit, (c) possibility of destruction of evidence, (d) possibility of violence, (e) knowledge that the subject is fleeing or attempting to flee, and (f) substantial risk of harm to the persons involved or to the law enforcement process if the officers must wait for a warrant.

3

- *Hernandez* at ¶¶ 16–19. When vehicle stopped, officer approached, smelled marijuana, and ultimately arrested defendant; court held that, once officers initiated traffic stop and defendant failed to stop and instead led them into backyard area of residence, defendant consented to officers entry into that area: "Hernandez effectively invited them there"; court noted that, under § 28–1595(A), once officers initiate traffic stop, driver of pursued vehicle does not have legal right to fail or refuse to stop; court also held officers' actions did not violate defendant's right to privacy under the Arizona Constitution.

4

U.S. Const. amend. 4 Search and seizure—Legitimate expectation of privacy.

- *State v. Lohse,* 245 Ariz. 536, 431 P.3d 606 (Ct. App. 2018). Officers entered defendant's property; record suggested public was presented with two barriers, second opaque; further, there was evidence those barriers were coupled with warning sign discouraging entry.

5

- **us.a4.ss.xp.120** A resident revokes the general license to approach the front door when circumstances clearly indicate that uninvited visitors are not welcome.
- ¶¶ 15–20. Court remanded for trial court to make findings of fact to determine what circumstances existed on day in question pertinent to whether defendant had revoked the general license to approach.

6

U.S. Const. amend. 4 Search and seizure—Probable cause—Warrant.

- *State v. Lohse,* 245 Ariz. 536, 431 P.3d 606 (Ct. App. 2018). Search warrant for defendant's residence gave the address of another home on the same block.

- **us.a4.ss.pc.w.030** A warrant must describe the person or place to be searched in sufficient detail to identify the person or place with reasonable certainty.

7

- ¶¶ 21–23. Although search warrant listed address of another home on same block, it included such details as color scheme of home, types of fences, that defendant's truck was parked out front (listing its make, model, license plate, and vehicle identification number), and "that Deputies [we]re standing by at the residence, awaiting the completion of a warrant to search the residence/property"; court held that, notwithstanding erroneous address, warrant more than sufficiently described defendant's home with reasonable certainty and particularity.

8

U.S. Const. amend. 5 Self-incrimination—Voluntariness hearing.

- *State v. Bush,* 244 Ariz. 575, 423 P.3d 370 (2018). Defendant did not challenge the admissibility of his confession at trial, but contended on appeal that his confession was involuntary.

- **us.a5.si.010** The trial court's duty to hold a voluntariness hearing, and the state's burden to establish that the confession is admissible, does not arise until the defendant makes a motion to suppress the confession, stating the specific facts supporting the claim that the confession was involuntary or taken in violation of *Miranda.*

9

- ¶¶ 49–52, 61. Court noted that, at no point before or during trial did defendant move to suppress evidence of his statements, request voluntariness hearing, or object to admission of his statements, and that defendant did not argue that his failure to do so was based on evidence that "was not then known" or that "could not then have been known" if he exercised "reasonable diligence" to discover it; court thus held defendant forfeited his argument by failing to raise any issue about voluntariness of his confession in timely manner; court further noted that Supreme Court in *Wainwright v. Sykes* clarified rule in *Jackson v. Denno* and rejected interpretation of *Jackson* that it had applied in older line of cases, and therefore disavowed any statements in those older cases that are inconsistent with *Wainwright* or *State v. Alvarado*.

10

- *State v. Snee,* 244 Ariz. 37, 417 P.3d 802 (Ct. App. 2018). Before trial, defendant filed motion to suppress confession, but later withdrew it; on appeal, defendant contended A.R.S. § 13–3988(A) requires trial courts to conduct voluntariness hearings "whenever the State offers a defendant's confession as evidence, even if one is not requested by the defense."
- ¶¶ 3–10. Court rejected defendant's contention and held that "any issue" of voluntariness, as stated in the statute, does not arise until the defendant makes a motion challenging the admissibility of the confession.

11

U.S. Const. amend. 5Self-incrimination—Voluntariness.

- *Snee.* Defendant contended that detective's observation that, quicker interview progressed, sooner it would end, was an impermissible promise that rendered his confession involuntary.

12

- **us.a5.si.vol.080** In order for a confession to be involuntary within the meaning of the Due Process Clause, the officers must have exercised **coercive pressure** that was not dispelled; if the totality of the circumstances show the police did not engage in improper conduct that overwhelmed the defendant, or that their conduct did not cause the defendant to give a confession that the defendant otherwise did not want to give, the confession will be considered **voluntary.**

- ¶¶ 10–13. Court held that, even if it were obligated to consider defendant's issue on appeal, detective's observation did not, without promise of leniency or more, constitute impermissible promise.

13

Ariz. Const. art. 2, sec. 2.1(C). Victim's rights—Definition of "victim."

- *E.H. v. Slayton (Conlee),* 245 Ariz. 331, 429 P.3d 564 (Ct. App. 2018), Conlee was charged with killing victim, and trial court had designated advocate from county victim witness services as representative; victim's sister contended the trial court could also appoint her as the victim's representative.

14

- **az.2.2.1.c.070** The Arizona Constitution provides that, if the person is killed or is incapacitated, "victim" includes the person's spouse, parent, child, or other lawful representative, and A.R.S. § 13–4401(19) has broadened that class to include grandparent, sibling, or any other person related to the person in the second degree by consanguinity or affinity; but nothing in the constitution or statute provides that only one of these classes of persons may be considered the victim's representative.

- ¶¶ 1–10. Court held trial court erred in refusing to designate victim's sister as an additional representative.

15

- *Z.W. v. Foster,* 244 Ariz. 478, 422 P.3d 582, ¶¶ 2–7 (Ct. App. 2018). Victim challenged the trial court's ruling denying her request to preclude reference to her as the "alleged victim," arguing that allowing defense counsel to refer to her in that manner, rather than simply as the "victim," violated her statutory and constitutional rights under Arizona's Victims' Bill of Rights.
- **az.2.2.1.c.140** The constitutional protections afforded a crime victim do not mandate that a specific term be used in referring to the victim during court proceedings; instead, the superior court retains discretion to address—on a case-by-case basis—whether using a particular term to refer to a victim violates the victim's right to be treated with respect and dignity.

16

- ¶¶ 2–7. Court held trial court was permitted to refer to "alleged victim"; stated it would be proper to refer to "victim" when there was no dispute that someone committed offense, and only question was whether defendant was person who did so.

17

Ariz. Const. art. 2, sec. 22. Bailable offenses.

- *State v. Wein (Goodman),* 244 Ariz. 22, 417 P.3d 787 (2018). Defendant was charged with sexual assault; trial court held state failed to prove defendant was ongoing danger to community and set bail.
- **az.2.22.010** To the extent art. 2, § 22(A)(1) denies release to a defendant charged with certain enumerated offenses, it is unconstitutional; instead, a defendant may be denied release only for an offense that inherently demonstrates future dangerousness, and for an offense that does not inherently demonstrate future dangerousness, only if the state proves by clear and convincing evidence that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community.
- ¶¶ 2, 20–29. Court held sexual-assault charge alone does not inherently demonstrate that accused will pose unmanageable risk of danger if released pending trial.

18

- *Morreno v. Brinker,* 243 Ariz. 543, 416 P.3d 807, ¶¶ 24–35 (2018). Defendant was charged with possession of marijuana and possession of drug paraphernalia (both felonies) and released on his own recognizance; 2 months later, he was again arrested and charged with felony possession of marijuana and possession of drug paraphernalia; he failed to appear for his initial appearance, and court issued arrest warrant; he was later arrested and held without bail pursuant to On-Release provision; court held, to extent this section precludes bail for felony offenses committed when person is already admitted to bail on separate felony charge, it satisfies heightened scrutiny under due process clause.

19

Ariz. Const. art. 2, sec. 23. Trial by jury—Right to a jury

- *State v. Kakauki,* 243 Ariz. 521, 414 P.3d 690 (Ct. App. 2018). Defendant was charged with theft and contended he was entitled to a jury trial.
- **az.2.23.rj.020** To determine whether the offense mandates a jury trial, the court should consider whether the offense is an offense, or shares substantially similar elements as an offense, for which the defendant had a common-law right to a jury trial before statehood.
- ¶¶ 1–17. Court held that, although the statute provides six ways in which person may commit theft, because at least one variety of theft has common-law antecedent, defendant charged with misdemeanor theft has right to have guilt determined by jury.

20

Ariz. Const. art. 2, sec. 24. Rights of an accused—Trial by jury.

- *Spence v. Bacal,* 243 Ariz. 504, 413 P.3d 1254 (Ct. App. 2018). Defendant was charged with three counts of misdemeanor assault and contended he was entitled to a jury trial because the aggregate (consecutive) terms would be more than 6 months.
- **az.2.24.rj.070** A defendant is not entitled to a jury trial when charged with multiple petty offenses even if there is the possibility of an aggregate (consecutive) term of more than 6 months.
- ¶¶ 4–16. Court held defendant was not entitled to a jury trial.

21

U.S. Const. amend. 4 Search and seizure—Investigative stop and reasonable suspicion.

- *State v. Turner,* 243 Ariz. 608, 416 P.3d 872 (Ct. App. 2018). Officer saw vehicle make fairly fast turn; officer ran registration check on vehicle and registered owner and discovered that owner (defendant) had revoked driver license; officer stopped vehicle and subsequently arrested defendant for DUI; Defendant contended officer did not have reasonable suspicion to believe he was the driver of the vehicle.

22

- **us.a4.ss.is.030** Reasonable suspicion exists when an officer sees a vehicle on the road and finds that the registered owner of the vehicle does not possess a valid driver license; because the officer does not have to rule out an innocent explanation to have reasonable suspicion, the possibility that the vehicle is being driven by someone, other than the owner, who does have a valid license does not negate that reasonable suspicion.
- ¶ 8 "We likewise conclude that when an officer discovers that the registered owner of a vehicle has a suspended or revoked driver license, the officer has reasonable suspicion to stop the vehicle, and no further inquiry is required."

23

28–1321 Implied consent—Implied consent to submit to test.

- *State v. De Anda,* 246 Ariz. 104, 434 P.3d 1183 (2019). Defendant submitted to a **blood** test after he was arrested for DUI; he argued his consent was involuntary under the 4th Amendment because, before he was asked if he would submit to the test, the police officer told him his driving privileges would be suspended if he refused.

24

- **.030** Informing a driver (1) that "Arizona law states that a person who operates a motor vehicle at any time in this state gives consent to a test or tests of blood, breath, urine or other bodily substances"; (2) the officer is authorized to request more than one test and may choose the types of tests; (3) what will happen if the test results are not available or indicate a certain alcohol concentration; (4) the consequences of a refusal or unsuccessful completion the tests; and (5) then asking if the person will submit to the tests does not make any subsequent consent involuntary.
- ¶¶ 1, 8–16. Court rejected defendant's contention; court stated "the state would be well advised to use the more recently revised version of the implied consent form, as amended after *Valenzuela II,* to follow the procedure set forth in § 28–1321(B) or otherwise provide the arrestee a clear choice whether to submit to testing or refuse consent."

25

- *Diaz v. Bernini,* 246 Ariz. 114, 435 P.3d 457 (2019). Defendant moved to suppress **breath** test result, arguing her consent was not voluntary under either 4th Amendment or A.R.S. § 28–1321.
- **.050** The 4th Amendment does not require suppression of **breath**-test results because a warrantless **breath** test is allowed as a search incident to a lawful DUI arrest, thus the state need not establish that the suspect voluntarily consented to the test.
- ¶¶ 6–8. Defendant was administered warrantless **breath** test after her arrest for DUI; test results were therefore admissible under 4th Amendment regardless of whether her consent was voluntary.

26

- **.060** Under Arizona's implied consent statute, a law enforcement officer may obtain a **blood** or **breath** sample from a person arrested for driving under the influence only if the arrestee expressly **agrees** to the test; apart from any constitutional considerations, the statute itself does not require that the arrestee's **agreement** be voluntary.
- ¶¶ 10–17. Court held word **"consent"** in subsection (A) was not same as word **"agree"** in subsection (B), thus held statutory requirement of express **agreement** to testing did not equate to or necessarily imply a voluntary **consent** requirement; court noted voluntary **consent** (or exigent circumstances) was required under the 4th Amendment only for **blood** tests.

27

- *State v. Weakland,* 246 Ariz. 67, 434 P.3d 578 (2019). Defendant contended good-faith exception to the exclusionary rule should not apply to admit **blood** test evidence unconstitutionally obtained after *Butler* (5-30-2013), but before *Valenzuela II* (4-26-2016).
- **.070** The exclusionary rule is a prudential doctrine invoked solely to deter future violations, thus when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the good-faith exception applies because the deterrence rationale loses much of its force, and the exclusionary does not apply.

28

- ¶¶ 1, 6–20. Court held *Butler* decision did not place police on notice that use of admin per se admonition was constitutionally suspect, thus held good-faith exception to exclusionary rule applied to **blood**-test evidence unconstitutionally obtained after *Butler* but before Valenzuela.
- *Accord, Alsarraf v. Bernini,* 244 Ariz. 447, 421 P.3d 157, ¶¶ 8–11 (Ct. App. 2018).

29

- *Soza v. Marner,* 245 Ariz. 454, 430 P.3d 1265 (Ct. App. 2018). Defendant was given warrantless **breath** test incident to lawful arrest; defendant contended test was in violation of A.R.S. § 28–1321 and thus results should be suppressed.
- **.080** Like the federal courts, Arizona courts have not employed the exclusionary rule for statutory violations unless the statute implicates 4th Amendment rights, and have instead left the remedy for any violation to the legislature, and because the legislature has not mandated exclusion as a remedy for a violation of § 28–1321, the courts will not apply the exclusionary rule to a violation of that statute.

30

- ¶¶ 15–24. Court assumed without deciding that defendant's agreement to **breath** test was involuntary, and because there was no agreement and no warrant, the **breath** test violated § 28–1321; court held **breath** test given pursuant to lawful arrest would not violate 4th Amendment, and held exclusionary rule did not apply to violation of § 28–1321.

31

28–1388(E) Blood and breath tests; violation; classification; admissible evidence—Sample of blood, urine, or other bodily substance.

- *Diaz v. Van Wie,* 245 Ariz. 235, 426 P.3d 1214 (Ct. App. 2018). Defendant was found unresponsive in vehicle that had crashed and was taken to hospital; hospital personnel drew **blood** for medical purposes and stored it securely; police were advised that medical personnel had drawn **blood** from defendant for medical purposes, and without attempting to obtain warrant, took custody of portion **blood** sample

32

- **.010** To invoke the medical **blood** draw exception set forth in this section, the state must establish the following: (1) probable cause existed to believe the suspect was driving under the influence; (2) exigent circumstances made it impractical for law enforcement to obtain a warrant; (3) medical personnel drew the **blood** sample for medical reasons; and (4) the provision of medical services did not violate the suspect's right to direct his or her own medical treatment.
- ¶¶ 8–13. Court held state failed to show exigent circumstances and ordered sample suppressed.

33

- **.020** In blood-alcohol cases, the 4th Amendment may be implicated at three stages: (1) the physical intrusion into the body to draw **blood**; (2) the exercise of control over and the testing of the **blood** sample; and (3) obtaining the results of the test; when the physical intrusion is conducted by treating medical personnel, independent of government action, the 4th Amendment does not apply to that stage; in such circumstances, the 4th Amendment is not triggered until the state takes custody of the existing **blood** sample, tests it, and receives test results.

- *Diaz* at ¶¶ 8. Court held state failed to show exigent circumstances and ordered sample suppressed.

34

- **.030** As enacted by the Arizona Legislature, this section provided that a law enforcement officer may obtain a portion of a **blood** sample if (1) medical personnel drew the **blood** sample for medical reasons, and (2) the officer had probable cause to believe the suspect was driving under the influence; to this, the Arizona Supreme Court has added the requirements that (3) the provision of medical services did not violate the suspect's right to direct his or her own medical treatment, and (4) exigent circumstances made it impractical for law enforcement to obtain a warrant; further, the United States Supreme Court has held that the natural dissipation of alcohol in the bloodstream is not a *per se* exigent circumstance.

- *Diaz* at ¶¶ 9–11. As stated by the court: "As a practical matter, our supreme court's recognition of the constitutional exigency requirement as a necessary element of the statutory medical-draw exception renders the statute toothless."

35